The Decontextualization of Music in Political Settings: An Argument for Moral Rights for Musical Works

CHANCE JOHNSON*

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* Articles Editor, *Ohio State Law Journal*; Juris Doctor Candidate, The Ohio State University Moritz College of Law, 2019; Bachelor of Arts, Oklahoma City University, 2016. I would like to thank the staff of the *Ohio State Law Journal* that reviewed my work and helped me bring it to publication quality. I would also like to thank my parents, Greg and Ann; my sister, Clarissa; and my girlfriend, Kyndal Jones, for their support and encouragement.

I. INTRODUCTION

It is hard to imagine what could bring an artist to symbolically and, to some extent literally, destroy his own creation. Such was the case with Matt Furie and Pepe the Frog. Furie created Pepe more than a decade ago as a character in his comic *Boy's Club*.[1] At the time he was created, Pepe could best be described as "an anthropomorphic frog that lives with a party wolf, a bear-like creature, and then kind of a muppety, dog-like creature . . . in a one-room apartment. And [they] kinda just party together and pull pranks on one another and hug each other . . . ."[2] By 2015, however, the harmless "everyman" that Furie envisioned had morphed into something more troubling: the insignia for "alt-right" extremist groups, a dog whistle for white nationalists, and a badge of honor for disaffected Internet trolls.[3] In September 2016, the Anti-Defamation League (ADL) designated Pepe a hate symbol.[4] After concerted efforts by Furie and the ADL to reclaim Pepe and restore his image failed, Furie laid Pepe to rest, depicting his funeral in a one-page comic.[5]

Pepe's story is just one dramatic example of the power of social forces to transform the meaning of pieces of popular culture into something dramatically different than what the author intended. For other artists, the threat continues to loom that their work might be appropriated by individuals, groups, or social movements with which they do not agree. One purpose of this Note is to show that an increasingly likely source of problems like these is the unauthorized use of popular music by political candidates and groups in their activities and discourse.

To that end, it is worthwhile to look at another example, involving one of America's largest pop stars, Taylor Swift, and groups similar to those that co-

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[1] Sam Sanders, *What Pepe the Frog's Death Can Teach Us About the Internet*, NPR (May 11, 2017), http://www.npr.org/sections/alltechconsidered/2017/05/11/527590762/what-pepe-the-frogs-death-can-teach-us-about-the-internet [https://perma.cc/7SZB-5T5E] (describing the creation, corruption, and untimely demise of Pepe).

[2] *Id.*

[3] *Id.* ("[T]he meaning of Pepe as kind of a white nationalist or alt-right symbol kind of exploded. It was considered by many to be a tactic of dog-whistling from the Trump campaign to that sect of white nationalists online, and it became a new symbol for white nationalists maybe not online.").

[4] *ADL Adds "Pepe the Frog" Meme, Used by Anti-Semites and Racists, to Online Hate Symbols Database*, ADL (Sept. 27, 2016), https://www.adl.org/news/press-releases/adl-adds-pepe-the-frog-meme-used-by-anti-semites-and-racists-to-online-hate#.V-rqlvkrJaQ [https://perma.cc/65K3-35WV] (explaining that the "Hate on Display" database was founded in 2000 as part of the ADL's effort to track hate groups and help law enforcement and education efforts).

[5] Jacey Fortin, *Pepe the Frog Is Dead, or So His Creator Hopes*, N.Y. TIMES (May 8, 2017), https://www.nytimes.com/2017/05/08/us/pepe-the-frog-comic.html [https://perma.cc/S7GV-CTCX] (describing Furie's personal struggles with how his character has been used and explaining how Furie's dramatic attempt to lay his character to rest may not ultimately be successful).

opted Pepe. In late 2017, the left-leaning blog, PopFront, published a piece in response to Swift's new music video, "Look What You Made Me Do."[6] The piece suggested that Swift's music video represented her latest covert message to white supremacists that she supports the "re-awakening" of their movement.[7] PopFront was building on a narrative, that has gained traction in recent years, that Swift is a closeted racist.[8] Former Breitbart columnist, Milo Yiannopoulos, traced the origin of this narrative back to 2013 and a Pinterest account that began posting images of Swift accompanied by quotes from Adolf Hitler, supposedly doing so to draw attention to the problem of quotes being misattributed to celebrities.[9] This narrative has been embraced by some members of the alt-right as well, most notably Andrew Anglin, who runs the white supremacist blog, the *Daily Stormer*.[10] Anglin has published dozens of posts about Swift, often referring to her as a an "Aryan Goddess."[11]

Without speculating on Swift's political leanings,[12] a number of things about this story should be concerning to present and future musicians. First, the

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[6] *Swiftly to the Alt-Right: Taylor Subtly Gets the Lower Case "kkk" in Formation*, POPFRONT (Sept. 5, 2017) [hereinafter *Swiftly*], http://popfront.us/2017/09/swiftly-to-the-alt-right-taylor-subtly-get-the-lower-case-kkk-in-formation/ [https://perma.cc/F7XD-9JE8].

[7] *Id.* ("Taylor's lyrics in 'Look What You Made Me Do' seem to play to the same subtle, quiet white support of a racial hierarchy. Many on the alt-right see the song as part of a 're-awakening,' in line with Trump's rise. At one point in the accompanying music video, Taylor lords over an army of models from a podium, akin to what Hitler had in Nazis Germany. The similarities are uncanny and unsettling.").

[8] Camille Paglia, *Camille Paglia Takes on Taylor Swift, Hollywood's #GirlSquad Culture*, HOLLYWOOD REP. (Dec. 10, 2015), https://www.hollywoodreporter.com/news/camille-paglia-takes-taylor-swift-845827 [https://perma.cc/AQU2-EZK8] (calling Swift a "Nazi Barbie"); Mitchell Sunderland, *Can't Shake It Off: How Taylor Swift Became a Nazi Idol*, BROADLY (May 23, 2016), https://broadly.vice.com/en_us/article/ae5x8a/cant-shake-it-off-how-taylor-swift-became-a-nazi-idol [https://perma.cc/G5VM-VR2L] (describing white supremacist groups infatuation with Swift).

[9] Milo Yiannopoulos, *Taylor Swift Is an Alt-Right Pop Icon*, BREITBART (May 11, 2016), http://www.breitbart.com/milo/2016/05/11/taylor-swift-alt-right-pop-icon/ [https://perma.cc/ADZ6-EB8T].

[10] Sunderland, *supra* note 8 (quoting Anglin as saying "[f]irstly, Taylor Swift is pure Aryan goddess, like something out of classical Greek poetry. Athena reborn. . . . It is also an established fact that Taylor Swift is secretly a Nazi and is simply waiting for the time when Donald Trump makes it safe for her to come out and announce her Aryan agenda to the world. Probably, she will be betrothed to Trump's son, and they will be crowned American royalty.").

[11] *Id.*

[12] When the first draft of this Note was completed, Swift had been maintaining a fairly notorious silence regarding her political opinions. Sandra Gonzalez, *Taylor Swift No Longer Mum on Politics After Endorsing Democrats in Tennessee Midterm Races*, CNN (Oct. 8, 2018), https://www.cnn.com/2018/10/07/entertainment/taylor-swift-politics/index.html [https://perma.cc/ZL3P-XSSC]. On October 7, 2018, however, Swift broke her silence in a post on her Instagram. Taylor Swift (@taylorswift), INSTAGRAM (Oct. 7, 2018), https://www.instagram.com/p/BopoXpYnCes/?utm_source=ig_embed

association between Swift and white supremacists may well have been predicated on careless, but not necessarily nefarious, actions by third parties.[13] Second, Swift may not have done anything to warrant this association, other than making some questionable and arguably insensitive creative choices in past music videos.[14] Third, it is not just her reputation but also the meaning of her work that is being affected by this narrative.[15]

Concerns such as these are the driving motivation for this Note. Its purpose is to show that the unauthorized use of music in political campaigns and activities presents a unique risk to the moral rights of musicians. As is evident in the cases of Furie and Swift, artists can see their creations diminished and their meaning called into question based on careless associations with problematic ideas. Political campaigns are, perhaps more than anything, vehicles for ideas; some noble, some legitimate, some questionable, and some troubling.[16] When a piece of music is played in a political setting, an association is created between that work and the ideas promoted in that setting. The results of that association have the potential to be detrimental to the work and its author. Previous commentators have assigned a term to this phenomenon, "decontextualization."[17] For the remainder of this paper, "decontextualization" will be used to refer to the use of music without an artist's consent or in settings contrary to the music's intended meaning.

[https://perma.cc/PRN5-3CEL]. The post contained a fairly lengthy caption, in which Swift acknowledged her prior reluctance to wade into politics; endorsed two Democratic candidates in Tennessee, Phil Bredesen and Jim Cooper; and encouraged her followers to vote. *Id.* Swift also spoke on issues of discrimination, saying, "I believe that the systemic racism we still see in this country towards people of color is terrifying, sickening and prevalent. I cannot vote for someone who will not be willing to fight for dignity for ALL Americans, no matter their skin color, gender or who they love." *Id.*

[13] *See* Yiannopoulos, *supra* note 9.

[14] *See* Prachi Gupta, *Taylor Swift's Music Video Is Uncomfortable, but Is It Really Racist?*, SALON (Aug. 20, 2014), https://www.salon.com/2014/08/19/is_taylor_swifts_new_music_video_offensive/ [https://perma.cc/C84J-3PYG] (analyzing some controversial scenes from Swift's "Shake It Off" music video in which she is depicted wearing gold chains and singing as a crew of black female backup dancers twerk around her).

[15] *Swiftly*, *supra* note 6 ("Taylor's are lyrics that connect with whites that are concerned with what they see as the white dispossession of power. . . . The lyrics validate those who feel that [they] have been wronged, e.g. white people angry about a black president.").

[16] *See* WILLIAM L. BENOIT, COMMUNICATION IN POLITICAL CAMPAIGNS vii–viii (2007) ("Elections are inherently and essentially communicative in nature.").

[17] Sarah C. Anderson, Note, *Decontextualization of Musical Works: Should the Doctrine of Moral Rights Be Extended*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 870 (2006) ("decontextualization is the use of an artist's work in a context with which the artist disapproves, thereby altering the integrity of the work."); *see* Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1, 3 (2001) (discussing the meaning and thus, context, an artist attaches to a particular song).

The unfortunate consequences of decontextualization can best be avoided by the adoption of a meaningful moral rights[18] doctrine for musical works in the United States. Part II provides necessary background information; namely, the history of unauthorized uses of popular music in campaign settings and a brief overview of moral rights. Part III discusses the inadequacy of current moral rights law in the United States. Part IV includes a case illustration of *Browne v. McCain*, arguably the most notable example of an artist attempting to stop the unauthorized use of his music in a campaign, which should reinforce the critique offered in Part III and offer a glimpse of the typical arguments offered by unauthorized users in response to these allegations of decontextualization. Part V discusses how the statutory inadequacies highlighted in Parts III and IV coupled with an increasingly polarized and toxic political environment create an urgent need for moral rights legislation for music in the United States. Part VI provides a statutory proposal for new moral rights legislation for musical works in the United States. Part VII will briefly conclude.

II. BACKGROUND

A. *History of Unauthorized Uses of Music in Political Campaigns*

Oddly enough, the use of popular music in political campaigns is a relatively recent phenomenon.[19] President Reagan in his 1984 presidential campaign is widely considered to be the first to make use of popular music in political settings when he started playing Bruce Springsteen's "Born in the U.S.A." at his rallies in order to convey a sense of "energy and patriotism."[20] Prior to that point, campaign music was specially written for the given election.[21] Much like his modern-day counterparts, Reagan's use of "Born in the U.S.A" was non-permissive.[22] Springsteen did not approve of Reagan's use of the song, refusing to endorse either Reagan or his opponent, Walter Mondale.[23] But since Reagan started the trend, "the practice of a political campaigns using popular music

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[18] Moral rights theory is a European concept built around the beliefs that artists have a relationship with their work that does not end upon its completion or sale and that any harm that befalls their work translates into personal harm to the artist. *See infra* notes 37–42.

[19] *See* Erik Gunderson, *Every Little Thing I Do (Incurs Legal Liability): Unauthorized Use of Popular Music in Presidential Campaigns*, 14 LOY. L.A. ENT. L.J. 137, 139 (1993) (describing the shift of use from songs written exclusively for presidential campaigns to the more modern unauthorized use of popular music in presidential campaigns).

[20] *Id.* ("Reagan's re-election campaign also made extensive use of a song by country singer Lee Greenwood, 'God Bless the U.S.A.,' and played the song in an introductory video which ran prior to President Reagan's speech at the 1984 Republican National Convention.").

[21] *Id.* at 139.

[22] *Id.*

[23] *Id.* at 137 & n.3 (citing Chet Flippo, *The 25 Most Intriguing People of 1984: Bruce Springsteen*, PEOPLE, Dec. 24–31, 1984, at 28).

without authorization has become a feature taken almost for granted in the contemporary political landscape."[24]

The trend continued in 1988.[25] Democratic candidate Michael Dukakis utilized Neil Diamond's "America" at the Democratic National Convention and Creedence Clearwater Revival's "Fortunate Son" and Michael Jackson's "Man in the Mirror" at campaign stops.[26] Republican heir apparent George H.W. Bush also made use of Lee Greenwood's "God Bless the U.S.A." and Bobby McFerrin's "Don't Worry, Be Happy."[27] The presidential candidates in 2016 built on this tradition as well.[28] Hillary Clinton heavily utilized Rachel Platten's hit song, "Fight Song."[29] Then-candidate Donald Trump made use of a variety of songs during his campaign that gave rise to a fair amount of controversy.[30] His selections and the subsequent controversies will be discussed below.[31]

B. *Trump Controversies*

Candidate Trump became embroiled in a number of controversies due to his unauthorized uses of popular music in campaign activities.[32] The most notable instance came in the summer of 2016, when Trump ignited a controversy with the renowned British band, The Rolling Stones, by playing their hit song, "Start Me Up," following his victory in the Indiana Republican primary.[33] Shortly thereafter, Fran Curtis, the band's publicist stated, "The Rolling Stones have never given permission to the Trump campaign to use their songs and have

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[24] *Id.* at 137.

[25] Gunderson, *supra* note 19, at 140.

[26] *Id.*

[27] *Id.* (noting that McFerrin was a supporter of the Dukakis campaign and did not approve of Vice President Bush's use of his song).

[28] *See infra* notes 28, 30–40.

[29] Alyssa Rosenberg, *What Hillary Clinton's Campaign Songs Say that She Can't*, WASH. POST (July 29, 2016), https://www.washingtonpost.com/news/act-four/wp/2016/07/29/what-hillary-clintons-campaign-songs-say-that-she-cant/?utm_term=.d191317c955b [https://perma.cc/W22P-EPKD]. Platten did an interview about the use of her song by the Clinton campaign, during which she stated, "I was a little scared at first just because I knew the song meant a lot to a lot of people – and politics, no matter how important, divide us. I was a little frightened about that. But I'm proud of how it's been used. I don't have any regrets about it." Mikael Wood, *Rachel Platten on Hillary Clinton's Use of 'Fight Song': 'I Was a Little Scared at First,'* L.A. TIMES (Nov. 8, 2016), http://beta.latimes.com/entertainment/music/la-et-ms-rachel-platten-fight-song-hillary-clinton-20161108-story.html [https://perma.cc/LBC9-GWGU].

[30] *See infra* notes 30–40.

[31] *Id.*

[32] Deena Zaru & Jim Acosta, *Get Off My Song! Stones to Trump*, CNN: POLITICS (Aug. 16, 2017) http://www.cnn.com/2016/05/05/politics/rolling-stones-donald-trump/index.html [https://perma.cc/6T5T-42GH].

[33] *Id.*

requested that they cease all use immediately."[34] Trump also had run-ins with Adele,[35] Neil Young,[36] Steven Tyler,[37] and R.E.M.[38] In each case, the Trump campaign was utilizing the music without permission from the author or the copyright owner.[39] This growing trend of unauthorized use and increasing hostility between candidates and artists is one of the primary motivations for this Note.

The controversies have continued into Trump's presidency. On October 27, 2018, hours after a mass shooting at Tree of Life synagogue in Pittsburgh, Pennsylvania that left eleven people dead, Trump played Pharrell Williams' hit song "Happy" at a political event for the upcoming midterm elections.[40] Two days later, through counsel, Pharrell sent President Trump a cease-and-desist letter, in which the artist indicated that the song was inappropriate given the circumstances, that he had not and would not grant Trump permission to use the song, and that the unauthorized use constituted copyright and trademark infringement.[41] On November 4, 2018, Trump received criticism from two other artists, Rihanna and Axl Rose of Guns N' Roses, for using their music at campaign events without permission.[42]

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[34] *Id.* Days after this explicit denial of permission, Trump used another one of the band's songs, "You Can't Always Get What You Want," at a rally in West Virginia. *Id.*

[35] Jeremy Diamond, *Adele: Donald Trump Doesn't Have Permission to Use My Music*, CNN (Feb. 1, 2016), http://www.cnn.com/2016/02/01/politics/adele-donald-trump-music/ [https://perma.cc/Q6CS-V6CF].

[36] Rebekah Metzler, *Probably Not a Lot More Rocking in Donald Trump's Free World*, CNN (June 17, 2015), http://www.cnn.com/2015/06/16/politics/donald-trump-2016-neil-young-song/index.html [https://perma.cc/Q7YY-PYLL].

[37] Zaru & Acosta, *supra* note 32.

[38] Jason Newman, *R.E.M. to Trump, Other Pols: 'Go F–k Yourselves' for Using Our Music*, ROLLING STONE (Sept. 10, 2015), http://www.rollingstone.com/music/news/r-e-m-to-trump-other-pols-go-f--k-yourselves-for-using-our-music-20150909 [https://perma.cc/DT9T-CH8N].

[39] *See supra* notes 27–33.

[40] Amy B. Wang, *'Happy' Was Played at a Trump Event After the Pittsburgh Massacre. Now Pharrell Is Threatening to Sue Him.*, WASH. POST (Oct. 30, 2018), https://www.washingtonpost.com/arts-entertainment/2018/10/30/trump-played-happy-an-event-after-pittsburgh-massacre-now-pharrell-wants-sue-him/?noredirect=on&utm_term=.e41155da7ffa [https://perma.cc/9PWW-WRL8].

[41] *Id.*

[42] Lisa Respers France, *Rihanna Wants Trump to Stop the Music*, CNN (Nov. 5, 2018), https://www-m.cnn.com/2018/11/05/entertainment/rihanna-trump-music/index.html?r=https%3A%2F%2Fwww.google.com%2F [https://perma.cc/4XXF-UMTX]. Rose also accused Trump of exploiting loopholes in "blanket performance licenses" for event venues, a topic which will be discussed in a later Part. *Id.*

C. *What Are Moral Rights?*

Before preceding any further, a brief introduction to the concept of moral rights is necessary. *Droit Moral*, or moral rights theory, is a European concept,[43] predicated on the belief "that an artist's relationship with his creation does not end upon its completion."[44] Unlike a factory worker who is responsible for the creation of a cog that is mass-produced, an artist is responsible for the creation of a work that is "created from [a] unique vision."[45] That unique relationship between the artist and their work makes the artist "vulnerable to certain personal harms."[46] An artist's work is, in many ways, an extension of herself, and thus when her work is subject to action that might be considered prejudicial or harmful, the harm is not isolated to the work but translates to the artist as well.[47] In this way, moral rights are fundamentally different from economic rights, which are alienable and transferable.[48]

Despite being fundamentally different from economic rights, moral rights, like economic rights, exist primarily to incentivize creation.[49] Moral rights seek to "protect the artist's creative process by protecting the artist's control over that process and the finished work of art."[50] In a world where artists have confidence about the treatment they and their works will receive, they are more inclined to create.[51]

In Europe, four distinct moral rights are recognized: paternity, disclosure, withdrawal, and integrity.[52] Presently in the United States, only two of these rights are recognized, integrity and paternity (otherwise known as the right of

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[43] *See generally* Dan Rosen, *Artists' Moral Rights: A European Evolution, an American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155, 155 (1983) (detailing the French legal system's conception of artists' moral rights).

[44] *Id.* at 156.

[45] *Id.* (describing how works of art are not fungible).

[46] Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 42–43 (1998) (likening the harm suffered by artists whose moral rights are violated to individuals who have theirs rights of personality or personal civil rights violated).

[47] *Id.* at 43 ("When an artist creates, she produces something that allows others a glimpse into her individual human consciousness. . . . The artist stands uniquely open to attack upon her psyche because she is so closely connected to the creative process and the creative product. . . . The artist's reaction [to harm to her work] may even resemble her reaction to a physical injury to herself or someone very close to her.").

[48] *Id.* at 44 ("Moral rights, which protect a unique extension of the self, remain personal to the artist. The artist cannot sell them, give them away, or bequeath them.").

[49] *See id.*

[50] *Id.*

[51] *Id.*

[52] Rosen, *supra* note 43, at 155. Moreover, France has created an additional "resale right," which allows an artist to receive compensation each additional time the work is sold. *Id.* Some commentators do not conceive of the resale right as being a moral right due to its economic character, but it shares some similarities with moral rights in that it evinces a continuing relationship between the work and the artist, so it warrants mentioning here. *Id.* at 155–56.

attribution),[53] so discussion from this point forward will eschew further mention of the rights of withdrawal and disclosure.[54] The right of integrity is generally regarded as allowing artists to prevent any distortion, mutilation, modification, or other derogatory action in relation to their work, which would prejudice their reputations.[55] The right of attribution is two-fold: it allows artists to (1) claim credit for works they have created and (2) disclaim credit for works they have not created.[56]

III. GAPS IN U.S. MORAL RIGHTS LAW

A. *Statutory Inadequacy*

In 1988, the United States became a signatory to the Berne Convention for the Protection of Literary and Artistic Works.[57] The purpose of this treaty was to "harmonize moral and economic rights, so that both [types] of rights would coexist when a work of authorship materialized."[58] Initially, the United States was motivated to join the Berne Convention in order to obtain the benefit of copyright protections afforded by other signatory countries.[59] However, along with these benefits came certain obligations, including those in Article 6bis, which grants authors a right of attribution and right of integrity in their works.[60] Notably, the Berne Convention does include "musical compositions" in its definition of covered works.[61]

Prior to passing the Berne Convention Implementation Act (BCIA), Congress debated the necessity of new statutory provisions to comply with

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[53] The only existing moral rights law in the United States exists in the Visual Artists Rights Act (VARA), which creates a right of integrity and attribution for works of visual art. *See* 17 U.S.C. § 106 (2012) (providing authors of certain works the rights to "attribution and integrity"). VARA will be discussed in the greater detail in the following Parts. *See infra* notes 67–70.

[54] For the sake of clarity, the right of disclosure allows artists to refuse to expose their work to the public before they feel it is satisfactory. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 96 (1997). The right of withdrawal, sometimes referred to as the right of retraction, allows artists to withdraw their work, even after it has left their hands. *Id.*

[55] *Id.* at 99 (citing Berne Convention for the Protection of Literary and Artistic Works art. 6bis(1), Sept. 9, 1886, S. Treaty Doc. No. 99-27 [hereinafter Berne Convention] (as amended on Sept. 28, 1979)).

[56] *Id.* at 130 (citing 17 U.S.C. § 106A).

[57] Aurele Danoff, *The Moral Rights Act of 2007: Finding the Melody in the Music*, 1 J. BUS. ENTREPRENEURSHIP & L. 181, 186 (2007); Deborah Ross, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights?*, 68 N.C. L. REV. 363, 363 (1990).

[58] Danoff, *supra* note 57, at 185.

[59] *See id.* at 185–86. One of greatest benefits of membership in the Berne Union is that every signatory enjoys the copyright protections of all other signatories. *Id.* at 186.

[60] Berne Convention, *supra* note 55, at art. 6bis(1).

[61] *Id.* at art. 2(1).

requirements of Article 6bis.[62] Congress ultimately concluded that the United States could meet its obligations under Article 6bis based on an existing "patchwork" of state and federal laws.[63] This patchwork of remedies relies on three crucial threads. The first is Section 43(a) of the Lanham Act, which addresses false designations of origin and false descriptions and could, in some limited circumstances, be applied in attribution disputes over copyrighted works.[64] The second includes a number of provisions of the Copyright Act, which protect authors' exclusive rights in derivatives of their work, place limits on licensees' rights to alter and arrange musical compositions, and allow for the termination of licenses and transfers.[65] The third comprises various state and local laws addressing rights of publicity, contractual relations, fraudulent activity, unfair competition, defamation, and privacy.[66]

In 1990, Congress implicitly acknowledged that this patchwork did not provide adequate protection of moral rights when it passed the Visual Artists Rights Acts (VARA).[67] VARA grants waivable rights of attribution and integrity[68] to authors of "works of visual art."[69] While VARA constitutes the most substantial commitment to moral rights by the United States to date, it still falls noticeably short of the obligations the United States incurred by becoming a signatory to the Berne Convention. The Act's most significant shortcoming is evident in its title: it only applies to visual works, and not even all visual works but rather a few narrowly defined categories.[70] VARA's limited scope leaves authors of "musical compositions," mentioned in Article 2(1) of the Berne Convention, without any moral rights protections.

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[62] Notice of Inquiry: Study on the Moral Rights of Attribution and Integrity, 82 Fed. Reg. 7870, 7871 (Jan. 23, 2017) [hereinafter Notice of Inquiry] (citing H.R. REP. NO. 100-609, at 33 (1988)).

[63] *Id.* (citing S. REP. NO. 100-352, at 9–10 (1988); H.R. REP. NO. 100-609, at 37–38 (1988)).

[64] *Id.* (citing 15 U.S.C. § 1125(a)) (2012)).

[65] *Id.* (citing 17 U.S.C. §§ 106(2), 115(a)(2), 203 (2012)).

[66] *Id.* (citing H.R. REP. NO. 100-609, at 34 (1988)) (noting the important role that contract law plays for authors attempting to control aspects of their economic and moral rights).

[67] *See id.* at 7871–72. *See* 17 U.S.C. § 106A (providing morals rights to authors of certain works in the form of attribution and integrity).

[68] 17 U.S.C. § 106A(a).

[69] *Id.* § 101.

[70] *Id.* According to the Act, a "work of visual art" is

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

Id.

The United States Copyright Office seems to have taken notice of these deficiencies. In January 2017, the Office issued a Notice of Inquiry, inviting public comment on the status of moral rights law in the United States.[71] The Copyright Office stated that part of its goal was to determine "whether any additional protection is advisable in [the area of moral rights]."[72] Prior to issuing the Notice, the Copyright Office organized a symposium that covered the history of moral rights, their value to authors, the extent to which they are protected by current law, and the effect of technological innovation on moral rights.[73] Interestingly, the issue of unauthorized use of music in political campaigns was briefly addressed during the symposium.[74]

The enactment of VARA in 1990 and the 2017 Notice of Inquiry highlight an important reality. At the time the United States became a signatory to the Berne Convention and even still today, the statutory schemes that predated the BCIA were and are inadequate to protect the moral rights of authors of musical works.

B. *Contractual Protections*

While statutory provisions give rise to more uniform protection of authors' moral rights, authors are not left entirely helpless in the absence of such laws. In negotiating licensing agreements and contracts with record labels, some authors may be able to contract for their moral rights.[75] American copyright law has given rise to a fairly complex music licensing regime.[76] While a variety of licenses are provided for in this system, the most important among them are performance licenses, which allow the licensee to perform a work publicly.[77] According to the Copyright Act, "[t]o perform or display a work 'publicly'

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[71] Notice of Inquiry, *supra* note 62, at 7874 ("The Copyright Office seeks public comments addressing how existing law, including provisions found in title 17 of the U.S. Code as well as other federal and state laws, affords authors with effective protection of their rights, equivalent to those of moral rights of attribution and integrity.").

[72] *Id.* at 7870.

[73] *Id.* at 7874 ("As part of its effort to begin a dialogue about moral rights protections in the United States, the Copyright Office organized symposium entitled 'Authors, Attribution, and Integrity: Examining Moral Rights in the United States,' which was held on Apr. 18, 2016."). The results of the symposium were mixed, with some participants remarking that the existing patchwork of laws does provide adequate protection and others indicating that the patchwork is under-inclusive and ineffective. *Id.*

[74] Chris Castle et al., *Authors, Attribution, and Integrity: New Ways to Disseminate Content and the Impact on Moral Rights*, 8 GEO. MASON J. INT'L COM. L. 125, 137 (2016) [hereinafter Symposium]. Specifically, Scott Martin, Executive Vice President of Intellectual Property for Paramount Pictures, remarked that the risk of decontextualization that might run afoul of an artist's moral rights is greater with musical works. *Id.* at 125, 137.

[75] *See* Desai, *supra* note 17, at 4–10.

[76] For a thorough discussion of music licensing in the United States, *see id*.

[77] *Id.* at 7 ("The performance right is the most important right for songwriters and music publishers, with one-half of total music publishing returns arising from revenue associated with public performances.").

means—(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered . . . ."[78] Thus, public performances would include things like "radio and television broadcasts, the playing of a record, or the singing of a song."[79]

While performance rights are the most important to musicians and other licensors, policing public performances remains an incredibly difficult task.[80] This enforcement problem has given rise to institutions known as "performing rights societies," which assume the responsibility for safeguarding these rights.[81] In the United States, the two most popular performing rights societies are the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).[82] An artist or other copyright owner can contract with one of these societies to sublicense his or her work to others.[83] Individuals seeking to use the music in a public setting would pay the society for either an annual, blanket license or a per program license.[84] Upon receiving payment for the license, the society then distributes royalties to the artist.[85]

Performing rights societies provide a valuable resource to artists in policing their economic rights, but they are presently not well constituted to protect moral rights and may, in some circumstances, jeopardize them further.[86] Thus, with respect to performing rights societies, artists are left in an uncomfortable position. They must join in order to protect their economic interests, but in doing

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[78] 17 U.S.C. § 101; *see also id.*

[79] Desai, *supra* note 17, at 7. *But see* 17 U.S.C. § 110 (describing limitations on the exclusive right to public performances, including exceptions for educational purposes, religious purposes, and public broadcasting).

[80] Desai, *supra* note 17, at 7 ("[Musical work owners] would have a very difficult time policing performances in restaurants, stadiums, bars, or any other public place to retain their economic interest in the performance right.").

[81] *Id.* (explaining that the role of performing rights societies is to "license use of musical works, police their use, and distribute royalties based on use of these works"). If the society finds evidence of unauthorized uses, it is authorized by its members to bring suit against suspected infringers. *Id.* at 8.

[82] *See id.* at 7 (listing ASCAP and BMI as performance rights societies in the United States). Outside the United States, the Society of European Stage Authors and Composers, now known only as SESAC, Inc., is a prominent performing rights society. *Id.*

[83] *Id.* at 8.

[84] Desai, *supra* note 17, at 8 ("A person or entity that desires to obtain a performance license from a performing rights society can pay an annual fee for a blanket license that allows the licensee to perform one or more titles in the society's music catalog. A per program license is also available to television stations seeking a license from a performing rights society.").

[85] *Id.*

[86] *Id.* at 8, 21 ("[A]ny musician would be wise to join a performance rights society, but in doing so, the musician allows another entity to decide in what context the public performance of his or her song occurs. A song could be played out of context in a stadium, convention center, bar, radio broadcast, or anywhere else ASCAP and BMI can license public performances.").

so, they sacrifice control of the contexts in which their works are used.[87] The societies would likely say these concerns are overblown, at least with respect to the use of music in political settings. According to guidelines issued by ASCAP, its performance licenses for most venues exclude uses at conventions and other political events.[88] While that is technically true, the venues may also simply purchase a license specifically for conventions and other similar meetings.[89]

Theoretically, an artist could contract for restrictions on how his or her works are licensed by a performing rights society, but presently, this does not appear to be a common, or even uncommon, occurrence. Additionally, artists would not have much leverage in requesting these restrictions. Artists cannot effectively police the use of their work without ASCAP or BMI, and these organizations likely would not be willing to accept the inclusion of specific restrictions on individual works because they would interfere with the uniform treatment the organizations accord to their entire catalog within their licenses.

That being said, there is some evidence suggesting that artists have sought greater protection for their moral rights in negotiations with record labels and publishing companies.[90] In fact, artists typically request "marketing restrictions," which prevent these entities from licensing their work for things like advertising or use in motion pictures.[91] While some restrictions have become commonplace, if an artist has an interest in preventing any particular type of use, it becomes purely a matter of her ability to negotiate for such a restriction.[92]

Most commentators, however, discount the effectiveness of these contractual safeguards.[93] Chief among their concerns is a lack of awareness on behalf of disadvantaged authors who are so eager to sell their work that they might be willing to sign away their moral rights.[94] This risk is substantially greater when the publishing company is allowed to use form purchase agreements that require an author to surrender his or her rights of attribution and integrity.[95]

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[87] *Id.* at 21 ("A musician would act foolishly by not enrolling in one of these groups, and likely, a record company would act foolishly if it allowed an artist on its label to not join one of these groups.").

[88] *See Using Music in Political Campaigns: What You Should Know*, ASCAP https://www.ascap.com/~/media/files/pdf/advocacy-legislation/political_campaign.pdf [https://perma.cc/RVG9-9SJB].

[89] *See ASCAP Music License Agreements and Reporting Forms*, ASCAP https://www.ascap.com/music-users/licensefinder [https://perma.cc/HR69-2JKH].

[90] *See* Symposium, *supra* note 74, at 135–36.

[91] *Id.* at 135.

[92] *Id.* at 135–36. (describing leverage dynamics between artists and record labels in negotiating for non-standard market restrictions).

[93] *See* Ross, *supra* note 57, at 373–74.

[94] *See id.* at 373.

[95] Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines*, 60 GEO. L.J. 1539, 1560 (1972) (describing how "commercial giants" in the music industry often utilize form contracts with granting clauses

In conclusion, with respect to contractual safeguards for moral rights, they seem to suffer from a few fatal flaws. First, contracting for them will inevitably decrease the value of the artists' economic rights. Second, most artists would be precluded from negotiating for them due to insufficient bargaining power.

IV. *BROWNE V. MCCAIN*: ARGUING FOR THE POLITICIANS

In the past, some artists have employed these tactics and legal theories in attempts to curtail acts of decontextualization by political candidates and campaigns. However, these cases are rarely ever decided on the merits and instead are resolved in settlements out of court.[96] Even so, some courts have been forced to address the relevance of the aforementioned legal doctrines in deciding preliminary motions.[97] Hopefully, in reviewing *Browne v. McCain*, arguably the most famous instance of this type of litigation, the uncertainty in this area of law will become clearer in a few specific ways. First, both the parties and the courts must jump through tremendous hoops in an attempt to shoehorn the essence of these complaints into the legal frameworks Congress deemed sufficient to protect moral rights. Second, despite their great efforts, these primarily economic doctrines cannot effectively resolve moral rights questions. Finally, this case will provide an adequate summary of the types of defenses that have been and likely will be asserted by political candidates in these disputes, should the current legal regime remain unchanged.

In August of 2008, Senator John McCain was in the midst of a campaign for the presidency of the United States against Senator Barack Obama.[98] In anticipation of a visit to Ohio by Obama, the Ohio Republican Party (ORP), acting on behalf of Senator McCain and the Republican National Committee (RNC), produced a web video attacking Senator Obama's proposed energy policy.[99] In keeping with the theme of the advertisement, the ORP added select clips from Jackson Browne's iconic song "Running on Empty" to the advertisement.[100] The ORP first published the advertisement on YouTube, but

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that require authors to surrender their rights to paternity and integrity as a precondition to sale of their work).

[96] *See, e.g.*, Byrne v. Crist, No. 810CV01187, 2010 WL 2833809 (M.D. Fla. Mar. 22, 2011); Henley v. DeVore, 733 F. Supp. 2d 1144 (C.D. Cal 2010); Browne v. McCain, 611 F. Supp. 2d 1062 (C.D. Cal. 2009).

[97] *See, e.g.*, *Browne*, 611 F. Supp. 2d at 1075 (C.D. Cal. 2009) ("Order Re Senator McCain's Motion to Dismiss for Failure to State a Claim").

[98] *Id.* at 1076.

[99] *Id.*; *see also* Eveline Chao, *Stop Using My Song: 35 Artists Who Fought Politicians Over Their Musics*, ROLLING STONE (July 8, 2015), https://www.rollingstone.com/music/lists/stop-using-my-song-34-artists-who-fought-politicians-over-their-music-20150708/jackson-browne-vs-john-mccain-20150629 [https://perma.cc/RN2U-UPNQ].

[100] *See* sources cited *supra* note 99; *see also* JACKSON BROWNE, *Running on Empty*, *on* RUNNING ON EMPTY (Asylum Records 1977) (including lyrics such as "Running on-running on empty, Running on-running blind, Running on-running into the sun, But I'm running behind").

it also aired on television and cable networks across Ohio and Pennsylvania.[101] After the advertisement aired, "Browne [] received numerous inquiries expressing concern about Defendants' use of [Running on Empty . . .]."[102] Browne then brought a suit in the United States District Court for the Central District of California against Senator McCain, the RNC, and the ORP alleging, among other things, (1) copyright infringement, (2) violation of the Lanham Act's prohibitions on false association or endorsement, and (3) violation of California's common law right of publicity.[103]

A. *Copyright Infringement*

In July 2009, the parties settled this case out of court,[104] but before a settlement was reached, the defendants filed a motion to dismiss all of Browne's claims.[105] In response to Browne's allegations of copyright infringement, Senator McCain argued that the claim should be dismissed because the advertisement was covered by the fair use doctrine.[106] Fair use was a common law doctrine that was codified in the Copyright Act; it exempts from infringement claims, uses of copyrighted works "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research."[107] The court ultimately concluded that it did not have enough facts at the time to make a proper ruling on fair use and consequently denied Senator McCain's motion to dismiss the copyright infringement claim.[108]

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[101] *Browne*, 611 F. Supp. 2d at 1077 ("The commercial was also aired on and discussed by the national news media, including MSNBC.").

[102] *Id.*

[103] *Id.*

[104] David C. Johnston, *The Singer Did Not Approve This Message: Analyzing the Unauthorized Use of Copyrighted Music in Political Advertisements in* Jackson Browne v. John McCain, 27 CARDOZO ARTS & ENT. L.J. 687 (2010) ("The settlement required Defendants to issue a public apology and pledge to get artists' permission before using music in the future."); *see also* Daniel Kreps, *Jackson Browne Settles with GOP Over "Running on Empty" Ad Use*, ROLLING STONE (July 21, 2009), https://www.rollingstone.com/music/music-news/jackson-browne-settles-with-gop-over-running-on-empty-ad-use-250454/ [https://perma.cc/DJV5-8QM7].

[105] *Browne*, 611 F. Supp. 2d at 1075.

[106] *Id.* at 1077.

[107] *Id.* (citing 17 U.S.C. § 107). In evaluating claims of "fair use," courts consider the following factors: (1) purpose and character of the use, including whether the use is commercial or for non-profit educational purposes; (2) nature of the copyrighted work; (3) amount and substantiality of the portion of the work used in relation to the work as a whole; and (4) effect of the use on the potential market for or value of the work. 17 U.S.C. § 107 (2006). Interestingly, the fair use doctrine functions as an exception not only to the exclusive economic rights granted to copyright owners in § 106 but also to the moral rights granted to authors of visual works in § 106A.

[108] *Browne*, 611 F. Supp. 2d at 1078.

B. *Trademark Infringement*

More enlightening was the court's discussion of Browne's claim of false endorsement under Section 43(a)(1)(A) of the Lanham Act.[109] Senator McCain offered three arguments in his motion to dismiss: (1) the provisions of the Lanham Act only apply to commercial speech, not political speech; (2) the claim is barred by the First Amendment and artistic relevance test; and (3) Browne cannot, as a legal matter, establish a likelihood of confusion.[110] The court did not find Senator McCain's argument about commercial speech compelling, concluding that the statute's "in commerce" language was not intended as a limit on the type of speech that the Lanham Act applies to.[111] Relying on Second Circuit precedent, the court stated definitively that the Lanham Act applies to both commercial and noncommercial speech, including political speech.[112]

The court then turned to Senator McCain's argument that Browne's claim should be dismissed because it is barred under the First Amendment.[113] The First Amendment arguments were essentially an extension of Senator McCain's noncommercial speech argument; since the advertisement is an act of noncommercial, political expression, it should not be constrained by trademark infringement claims.[114] As the court already stated, the Lanham Act can be applied to noncommercial speech, and thus, without more compelling reasons, the First Amendment cannot function as a bar to Browne's trademark infringement claims.[115]

Senator McCain made one final argument that the trademark infringement claim should be dismissed because the advertisement clearly identifies its source as the ORP and thus there is no likelihood of confusion as to where it came

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[109] *Id.* at 1078–81.

[110] *Id.* at 1078–79.

[111] *Browne*, 611 F. Supp. 2d at 1079

> [T]he Act's reference to use "in commerce" actually "reflects Congress's intent to legislate to the limits of its authority under the Commerce Clause" to regulate interstate commerce. The interstate commerce jurisdictional predicate for the Lanham Act merely requires a party to show that the defendant's conduct affects interstate commerce, such as through diminishing the plaintiff's ability to control use of the mark, thereby affecting the mark and its relationship to interstate commerce.

Id. (citing United We Stand Am., Inc. v. United We Stand Am. N.Y.C., Inc., 128 F.3d 86, 92 (2d Cir. 1997)).

[112] *Id.* at 1079 ("Indeed, the Act's purpose of reducing consumer confusion supports application of the Act to political speech, where the consequences of widespread confusion as to the source of such speech should be dire.").

[113] *Id.* at 1080. Senator McCain also argued that the claim was barred under the "artistic relevance" test, a doctrine adopted by certain jurisdictions regarding the use of trademarks in artistic works. *Id.* The artistic relevance arguments will not be discussed here because of the test's limited jurisdictional scope.

[114] *See* Memorandum of Points and Authorities in Support of Defendant John McCain's Motion to Dismiss, at 15–19; Browne v. McCain, 611 F. Supp. 2d 1062 (C.D. Cal. 2009).

[115] *Browne*, 611 F. Supp. 2d at 1080.

from.[116] However, as the court pointed out, the Senator's argument misunderstands the confusion requirement of 15 U.S.C. § 1125(a)(1)(A).[117] Even though a viewer may not be confused by the actual source of the advertisement, given the explicit identifier, there is a still a reasonable likelihood that a viewer might be confused as to whether Browne endorsed Senator McCain.[118]

C. *Right of Publicity*

Browne's final cause of action was a common law Right of Publicity Claim, which alleged, among other things, that Senator McCain's "usurpation of Browne's identity has caused and will cause irreparable harm to Browne that cannot be fully compensated by money."[119] Browne further alleged that, because of this reputational harm, he was entitled to injunctive relief prohibiting the Defendants from showing the advertisement in the future and punitive damages sufficient to deter similar conduct in the future.[120] In response, Senator McCain filed an "Anti-SLAPP" (Strategic Lawsuits Against Public Participation) motion, which are designed to prevent lawsuits intended to chill the valid exercise of constitutional speech rights.[121] California's Anti-SLAPP statute deploys a burden shifting framework to adequately balance the interests of the parties.[122] The initial burden is placed on the defendant to show that the plaintiff's claims arise from an act made in connection with an issue of public

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[116] *Id.*

[117] *Id.*; *see* 15 U.S.C. § 1125(a)(1)(A) (2012) (prohibiting uses of trademarks "in commerce . . . which [are] likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities.").

[118] *Browne*, 611 F. Supp. 2d at 1080–81. The court also took issue with Senator McCain's failure to address what are known as the *Sleekcraft* factors, which are used in determining whether a likelihood of confusion exists and include

> (1) the strength of the mark, (2) proximity or relatedness of the goods, (3) similarity of the marks, (4) evidence of actual confusion, (5) marketing channels used, (6) degree of care customers are likely to exercise in purchasing the goods, (7) defendant's intent in selecting the mark, and (8) likelihood of expansion into other markets.

Id. (citing KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 408 F.3d 596, 608 (9th Cir. 2005)).

[119] Complaint at 9, Browne v. McCain, 611 F. Supp. 2d 1062 (C.D. Cal. 2009) (No. CV08-05334 RGK) [hereinafter Browne Complaint]. The prima facie case for a claim under California's common law right of publicity requires a showing of "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of the plaintiff's name or likeness to defendant's advantage commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Browne*, 611 F. Supp. 2d at 1069 (citing White v. Samsung Electronics Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992)).

[120] Browne Complaint, *supra* note 119, at 9.

[121] *Browne*, 611 F. Supp. 2d at 1065, 1067.

[122] *Id.*

interest.[123] If the defendant meets their burden, the burden shifts to the plaintiff to establish a probability of success on the merits of his claim at trial.[124] The court did find that the action that prompted the complaint related to an issue of public interest[125] but ultimately concluded that Browne had shown a probability of success at trial.[126] Thus, the court denied Senator McCain's motion to dismiss the right of publicity claim.[127]

D. *Reflections on* Browne

As mentioned earlier, the value of this case comes from its ability to illuminate the deficiencies of the so-called "patchwork" of laws that Congress deemed sufficient to account for authors' moral rights. First, it makes clear that these economic-minded legal doctrines are poorly suited to the primarily non-economic interests of the parties in these suits.[128] This is best reflected in the court's discussion of Browne's trademark infringement claim. The court notes that other circuits have determined that the Lanham Act applies to both commercial and noncommercial speech, but in resolving this dispute the court returns the most basic purposes of the Act and trademark law in general, to "reduc[e] consumer confusion."[129] Thus, even if it is true that the Lanham Act was intended to regulate both commercial and noncommercial speech, its interest in doing so is still primarily, if not purely, economic.[130] While trademark legislation that is economically-focused is not problematic in the area of traditional trademark disputes, that focus can become problematic when it is applied to non-economic claims.[131] When the court is required to do this much work merely to show the applicability of the Lanham Act to the claim in question, it should be a strong indication that the Act is not well-suited to that claim.

The claim that seemed most similar to a moral rights claim was Browne's right of publicity claim. A right of publicity claim acknowledges, at least implicitly, that the author's identity is tied up in their work.[132] At the very least, this indicates an awareness of the reputational harm that accompanies actions like those of Senator McCain. Even so, the right of publicity fails to adequately

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[123] *Id.*

[124] *Id.* at 1067–68.

[125] *Id.* at 1068–69.

[126] *Browne*, 611 F. Supp. 2d at 1071.

[127] *Id.* at 1073.

[128] *See* Ross, *supra* note 57, at 364. (discussing the United States' preoccupation with economic interests in intellectual property law).

[129] *Browne*, 611 F. Supp. 2d at 1079.

[130] *See id.*

[131] *See* Ross, *supra* note 57, at 364.

[132] Browne Complaint, *supra* note 119, at 9 ("Browne's distinct and readily identifiable voice is widely known and closely associated with Browne. As such, Defendants' unauthorized use of Browne's voice in the Commercial invoked Browne's identity in the minds of the public.").

protect moral rights for a number of reasons. First, there is still a preoccupation with present and future economic harm.[133] But more importantly than that, the right of publicity is a common law doctrine that can be subject to differences from state to state, with some providing stronger enforcement mechanisms than others,[134] making the patchwork more vulnerable to holes than it would be in the presence of federal legislation.

V. URGENCY: THE TROUBLE OF DECONTEXTUALIZATION IN A TURBULENT POLITICAL CLIMATE

In addition to the clear deficiencies of the existing patchwork of protections of moral rights for musical works, the increasingly turbulent political climate underscores the need for a new moral rights doctrine for musical works. This Part describes the growing trend of political polarization and discusses how this trend exacerbates the risk of personal and reputation harm to artists resulting from decontextualization of music in political campaigns and settings.

Presently, there is a growing divide among the American public on the basis of political affiliation, with respect to fundamental political values, including the role of government, race relations, immigration, and environmental protection.[135] For example, according to the Pew Research Center, political polarization reached then-record levels during the presidency of Barack Obama.[136] However, in the first year of Donald Trump's presidency, the political divide has grown even wider.[137] Presently, a vibrant debate is taking

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[133] *Id.* ("Defendants usurpation of Browne's identity has caused and will cause irreparable harm to Browne that cannot be fully compensated by money.").

[134] *See* PUBLICITY, CORNELL LAW SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/publicity [https://perma.cc/5VSV-KXBW]; RIGHT OF PUBLICITY, THOMSON REUTERS (2019), https://corporate.findlaw.com/litigation-disputes/right-of-publicity.html [https://perma.cc/ADD8-FBUY].

[135] *See* THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER, PEW RES. CTR. (2017), http://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/ [https://perma.cc/C7L4-2Y7N] (finding that the magnitude of the divisions between Republicans and Democrats on key political issues "dwarfs other divisions in society, along such lines as gender, race and ethnicity, religious observance or education").

[136] *Id.*

[137] *Id.*

place regarding the cause of this polarization,[138] and whether it is a passing or permanent phenomenon.[139]

Understanding the relationship between this political divide and reputational concerns for artists is slightly more complicated though. It begins with the understanding that the political party has become an increasingly important form of social identity.[140] As might be expected, when political affiliation becomes a form of social identity, individuals begin to harbor positive feelings toward members of their party and similarly intense hostile feelings toward members of the alternative party.[141] Furthermore, it is clear that these attitudes have increased in intensity in recent decades.[142] The particularly unfortunate thing about these divides, commonly referred to as affective polarization, is that they are not constrained by social norms in the same ways as gender and race-based divides.[143] In fact, the divide is often encouraged by

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[138] *See, e.g.*, Lexi Boxel et al., *Greater Internet Use Is Not Associated with Faster Growth in Political Polarization Among US Demographic Groups*, 114 (40) PROC. NAT'L ACAD. SCI. U.S.A. 10612, 10612 (2017) (arguing that greater Internet use is not the cause of increasing polarization); John V. Duca & Jason L. Saving, *Income Inequality, Media Fragmentation, and Increased Political Polarization*, 35 (2) CONTEMP. ECON. POL'Y 392, 392 (2016) (attributing polarization to fragmentation in American news media and income inequality); Kristin N. Garrett & Alexa Bankert, *The Moral Roots of Partisan Division: How Moral Conviction Heightens Affective Polarization*, BRIT. J. POL. SCI. (2018) (arguing that political polarization is caused and amplified in part by individuals' willingness to moralize partisan political stances).

[139] *Compare* Jane Mansbridge, *Three Reasons Political Polarization Is Here to Stay*, WASH. POST (Mar. 11, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/03/11/three-reasons-political-polarization-is-here-to-stay/?utm_term=.034f2f6c4124 [https://perma.cc/M4DJ-M2QX] (arguing that political polarization is not likely recede in the near future), *with* Robert Y. Shapiro, *Can Young Voters Break the Cycle of Polarization*, WASH. POST. (Jan. 20, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/20/can-young-voters-break-the-cycle-of-polarization/?utm_term=.f21454c6f741 [https://perma.cc/HQL5-UDRB] (arguing that Republicans can end the cycle of polarization by compromising on several social issues of particular important to millennials).

[140] Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence of Group Polarization*, 59 (3) AM. J. POL. SCI. 690, 690 (2014) ("While early studies viewed partisanship as a manifestation of other group affiliations . . . more recent work suggests that party is an important form of social identity in its own right . . . .").

[141] *Id.* at 692 ("[D]espite only mixed evidence of sharp ideological or partisan divergence in their policy preferences, Americans increasingly dislike people and groups on the other side of the political divide and face no social repercussions for the open expression of these attitudes."); *see also The Partisan Divide on Political Values Grows Even Wider: Partisan Animosity, Personal Politics, Views of Trump*, PEW RES. CTR. (2017) ("Among members of both parties, the shares with very unfavorable opinions of the other party have more than doubled since 1994.").

[142] Iyengar & Westwood, *supra* note 140.

[143] *Id.* ("Unlike race, gender, and other social divides where group-related attitudes and behavior are constrained by social norms . . . there are no corresponding pressures to temper disapproval of political opponents.").

and reflected in national political discourse.[144] As political affiliation has grown in importance as a form of social identity, what was once merely a political divide has morphed into a social divide.[145] Thus, affiliation of oneself or one's work with a particular political ideology has the capacity to seriously and negatively impact one's social identity.

Political polarization does not, in and of itself, pose a risk to artists, though. It really only stands to intensify a negative response to their association with a particular ideology.[146] There must be some sort of associating act that spurs the negative response. This is where decontextualization in the realm of political campaigns becomes important. When a candidate plays a song at their rally or a local political party uses a piece of music in a partisan advertisement, that association is created.[147] As was noted by the court in *Browne v. McCain*, observers of these practices could very well be confused as to whether the artist has endorsed the candidate or campaign.[148] Upon the occurrence of that association, the artist has then been made a party, unwillingly, to a caustic political struggle that has the capacity to tangibly affect their social and economic interactions and permanently affect the meaning of their work.[149] In light of these realities, the need for substantive moral rights for musical artists is clear.

IV. PROPOSED SOLUTION

Given these turbulent political dynamics and the increasing pressure they create for artists, a new moral rights framework for musical rights is necessary. Such a framework will require creating new statutory rights and addressing the contractual relationship between musicians, performing rights associations like ASCAP, and potential licensees. In doing so, a myriad of secondary issues will need to be addressed as well, including: contractual waiver of moral rights;

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[144] *Id.*

[145] *Id.* ("[P]artisan cues now also influence decisions outside of politics and that partisanship is a political *and* social divide."); Christopher McConnell et al., *Research: Political Polarization Is Changing How Americans Work and Shop*, HARVARD BUS. REVIEW (May 19, 2017), https://hbr.org/2017/05/research-political-polarization-is-changing-how-americans-work-and-shop [https://perma.cc/42ap-8ZRQ] (describing how political polarization and negative sentiments between members of different parties have begun to shape economic as well as political behavior).

[146] *See* Rob LeDonne, *Performing Is a Political Statement': Who Will Play at Donald Trump's Inauguration?*, THE GUARDIAN (Dec. 28, 2016) https://www.theguardian.com/us-news/2016/dec/28/trump-inauguration-music-performances-beach-boys [https://perma.cc/VMK3-6JUB] (illustrating the risks artists take by outwardly supporting a political candidate).

[147] *See* Luke O'Neil, *Can't Always Get What You Want: Why Artists Struggle to Stop Politicians Using Their Songs*, THE GUARDIAN (Oct. 30, 2018), https://www.theguardian.com/us-news/2018/oct/30/pharrell-trump-music-politicians-bands-cease-desist [https://perma.cc/2DV6-G6Z3].

[148] *Browne*, 611 F. Supp. 2d at 1081.

[149] *See* LeDonne, *supra* note 146.

reconciliation with existing statutes; appropriate remedies; and standards of review. Though this is an inherently difficult enterprise, it is imperative that Congress take action. This proposal will begin with a discussion of some preliminary issues, such as the appropriate philosophical and practical starting point and previous proposals by other commentators. It will then offer a potential legislative text. Finally, it will conclude with a discussion of how the proposed text addresses the primary and secondary issues mentioned above.

A. *Previous Proposals*

Previous commentators have proposed the creation of moral rights for musical works. Rajan Desai was one of the first to discuss the decontextualization of music and propose moral rights as a potential remedy for this problem.[150] Desai was preoccupied with music licensing, and his proposal focused primarily on two changes to existing law.[151] First among those changes is an amendment to the copyright code that would require artist consent for synchronization ("synch") licenses.[152] This new right would be waivable, if the artist is comfortable doing so.[153] The second prong of Desai's proposal is meant to address the loss of control by artists over how their music is used in performances and involves the creation of a cause of action for artists "based on the moral right of integrity in order to control how their music is used and prevent the use of their music in a context they find objectionable."[154] With respect to remedies, Desai proposed injunctive relief against both licensors and licensees as the primary means of recourse and "monetary damages" if violators repeatedly violated an artist's rights.[155]

In the years since Desai's original proposal, his licensing-focused approach has been subject to a fair amount of criticism.[156] For example, Sarah Anderson objected to the lack of clarity in Desai's proposal. The scheme, Anderson wrote, is entirely devoid of any clear standards that courts can use to assess alleged violations of an artist's moral rights.[157] Second, and more importantly, both rights created under his system would be subject to waiver.[158] Anderson astutely points out that given the inherent disparity in bargaining power between artists and publishers, leaving open the possibility of waiver effectively destroys any

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[150] Desai, *supra* note 17, at 19–23.

[151] Anderson, *supra* note 17, at 888–89.

[152] Desai, *supra* note 17, at 21. "Synchronization, or 'synch,' licenses . . . allo[w] the licensee to use (or synchronize) a musical work in an audiovisual work, such as a motion picture or television show." *Id.* at 9.

[153] *Id.* at 21.

[154] Anderson, *supra* note 17, at 888–89. This right would be waivable as well. *Id.*

[155] Desai, *supra* note 17, at 22–23.

[156] *See, e.g.*, Anderson, *supra* note 17, at 890–93.

[157] *Id.* at 890.

[158] *Id.* at 891–92.

rights that might have been created.[159] These critiques make clear that any new proposal would need to contain clearer standards and rights that are not entirely subject to contractual waiver.

B. *Finding a Proper Starting Point*

In crafting this new proposal, there are a number of clear potential foundations on which to build. Among the options would be the Berne Convention, the Visual Artists Rights Act, and the moral rights provisions of some foreign jurisdictions, like France. For these purposes, the Berne Convention appears to be the obvious choice. Article 2 of the Berne Convention already includes "musical compositions with or without words" in its definition of protected works.[160] This inclusion is an indication that the drafters of the moral rights provisions in Article 6bis were mindful of the special challenges presented by musical works and still considered them compatible with the rights conferred. As will be discussed below, that mindfulness is reflected in certain distinctions between the Berne Convention and these other frameworks, which ultimately makes the Berne Convention more advantageous.

While it does not identify them as such, the Berne Convention creates both a right of attribution and a right of integrity.[161] Substantively, these rights are very similar to those granted to authors of visual works under VARA.[162] However, there are some important differences, namely the catch all phrases at the end of the lists describing changes that might constitute a violation of an author's rights.[163] The Berne Convention's inclusion of "other derogatory action" in addition to distortion, mutilation, and modification is valuable for the protection of musical works from decontextualization. All three of those terms carry with them a connotation of more tangible alteration of a work, which would seem to place decontextualization outside the scope of actionable conduct. However, "other derogatory action" is an incredibly broad term, sufficiently open to interpretation to cover acts of decontextualization. The Berne Convention provides this greater coverage, while still being functionally

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[159] *Id.* at 892.

[160] Berne Convention, *supra* note 55, at art. 2(1).

[161] *Id.* at art. 6bis(1).

[162] *Compare id.* at art. 6bis(1) ("[T]he author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."), *with* 17 U.S.C. § 106A(a) (1990) ("[T]he author of a work of visual art shall have the right to claim authorship of that work . . . and . . . to prevent . . . intentional distortion, mutilation, or other modification of that work which be prejudicial to his or her honor or reputation . . . .").

[163] *Compare* Berne Convention, *supra* note 55, at art. 6bis(1) (including "other derogatory action" that would be prejudicial to the author's honor or reputation), *with* 17 U.S.C. § 106A(a) (including "other modification" that would be prejudicial to the author's honor or reputation).

compatible with the rights created by VARA and the jurisprudence that has developed since its enactment.

In addition to the scope of actionable conduct, Anderson has pointed out some compelling reasons why extending VARA to cover musical works would not resolve the issue of decontextualization.[164] First, Congress intended VARA to provide protection for artists' professional rather than personal reputations.[165] Second, VARA was primarily designed for, and expressly limited to, "works created in single copies or in limited editions."[166] This limitation would seem to exclude musical works due to the fact that they are essentially infinitely reproducible.[167] Finally, VARA contains a number of exceptions for conduct that would normally be considered violative of the right of integrity.[168] One such exception is for public presentation. The exception states that the "modification of a work that is the result of 'the public presentation . . . of the work is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence.'"[169] While revising the definition of works covered by VARA might seem like the simplest and most expeditious method for extending moral rights to musical works, a closer look at the nuances of the Act reveal that it would not be a sound starting point for the creation of moral rights for musical works.

Commentators often point to France's highly developed and progressive moral rights regime as an exemplar.[170] The French moral rights regime comprises four distinct rights.[171] In addition to the rights of attribution (*droit a la paternite*) and integrity (*droit au respect de l'oeuvre*), France recognizes two other moral rights. The *droit de divulgation* allows an artist to decide whether to publish, and the *droit de retrait ou de repentir* allows an author to withdraw or modify a work that has already been published.[172] Together, the extent of the control created by these four rights would be unheard of in the United States and seem almost absurd given the American preoccupation with economic rights.[173] Any attempt to translate those rights to American jurisdictions, given the

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[164] Anderson, *supra* note 17, at 893–97.

[165] *Id.* at 894. Any claim involving decontextualization, particularly of the form discussed in this note, would necessarily involve concerns about the artist's personal reputation, but Congress expressly disclaimed any interest in resolving cases where "the general character of the plaintiff is at issue," deeming it "irrelevant." *Id.* (citing H.R. REP. NO. 101-514, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925).

[166] *Id.* at 894; *see* 17 U.S.C. § 101 (explaining that works of visual art "exist[] in single copy" or "in limited edition").

[167] Anderson, *supra* note 17, at 894–95.

[168] *Id.* at 895.

[169] *Id.*

[170] *See, e.g.*, Russel J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 1, 1 (1980).

[171] *Id.* at 3.

[172] *Id.*

[173] Ross, *supra* note 57, at 364.

philosophical disparities between the two countries,[174] would be difficult to reconcile with existing law and hard to justify from practical standpoint.

For the foregoing reasons, the substantive rights described in the Berne Convention will serve as the basis for this proposal. Even so, it will draw significantly from parts of VARA in order to create a moral rights regime for musical works that is compatible with that of visual works and easily interpreted in light of American jurisprudence. Article 6bis, though, leaves unaddressed some of the significant doctrinal issues discussed above, namely contractual waiver, standards of review, and remedies.[175] Those issues will be addressed by the proposed legislative text in the next subpart. Following the proposed text will be an explanation of how it addresses those remaining questions. Finally, this part will conclude with a discussion of how this proposed legislation would reconcile with existing moral rights protections in the United States and how it is well-tailored to address the forms of decontextualization discussed in this note.

C. *Proposed Legislative Text*

Below is a proposed statutory text that would create rights for authors of musical works sufficient to guard against the harms of decontextualization. In addition to creating these rights, it contains provisions that address contractual modification of those rights and enforcement mechanisms.

Rights of authors of musical works to attribution and integrity:
(a) Rights of attribution and integrity--The author of a musical work--
  (1) Shall, independent of their economic rights, have the right--
    (A) to claim authorship of the work, and
    (B) to prevent the use of his or her name as the author of any musical work which he or she did not create;[176]
  (2) Shall have the right to prevent[177] any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his or her honor or reputation.
(b) Scope and exercise of rights--Only the author of a musical work has the rights conferred by subsection (a) in that work, whether or not the

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[174] *Id.* at 369.

[175] *See* Berne Convention, *supra* note 57, at art. 6bis(1).

[176] The Berne Convention does not contain this specific language. It is one of the ways in which the provisions of VARA go beyond the substantive rights described in the Berne Convention. *See* 17 U.S.C. § 106A(a)(1)(B) (1990). However, this extension of the right of attribution is not, in any way, contradictory to the provisions of the Berne Convention.

[177] When describing the right of integrity, the Berne Convention states that the artist has the right to "object to" any distortion, mutilation, modification, or other derogatory action. Berne Convention, *supra* note 55, at art. 6bis(1). This language is noticeably softer than the "prevent" language used in VARA. *See* 17 U.S.C. § 106A(a). To reinforce the strength of the right created under this provision, the prevent language was substituted for the object language.

author is the copyright owner. The authors of a joint work are co-owners of the rights conferred by subsection (a) in that work.

(c) Transfer and waiver. The rights conferred in subsection (a)--

(1) May not be transferred or waived through a written instrument signed by the author.[178]

(2) Ownership of the rights conferred in subsection (a) with respect to a musical work is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a).[179]

(d) Duration of rights. With respect to musical works created on or after effective date of this Act, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(e) Remedies. Any court having jurisdiction of a civil action arising under this Act may--

(1) grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of the rights conferred therein;

(2) grant compensatory damages in accordance with any reputational harm suffered by the plaintiff; and

(3) award punitive damages as needed to vindicate the rights of authors of musical works.

The following subparts contain more thorough explanations how these statutory provisions will resolve lingering concerns about the creation and enforcement of moral rights for authors of musical works.

D. *Contractual Waiver*

Subsection (c) of this proposal is arguably its most important and controversial element. When Desai attempted to provide a solution for the problem of decontextualization, his proposal made the artists' rights waivable.[180] However, as others have pointed out, reliance on waivable rights in an industry where there are significant disparities in bargaining power in the

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[178] This provision is one of the most important and substantial diversions from VARA. *See* 17 U.S.C. § 106A(e) (providing that moral rights "may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author.").

[179] This exact provision appears in VARA. *Id.* § 106A(e)(2). However, it contains an explicit exception allowing an author to transfer of moral rights through written agreement. *Id.* Effectively, it is a statutory acknowledgement of the separability of moral and economic rights and the inalienable nature of moral rights. *See supra* notes 42–47 and accompanying text.

[180] Desai, *supra* note 17, at 19–23.

negotiation of marketing and licensing agreement is an ineffectual approach.[181] While this would certainly be a substantial diversion from existing moral rights doctrines, it is necessary in order create functional protections for musical works. Desai even acknowledges that it would be difficult for most artists to seek protection through contractual provisions because they are often so desperate to be published that they will make significant concessions to ensure a recording deal.[182] This problem is particularly acute in the case of newer musicians who lack significant prior success.[183] While there may be some instances where sufficiently powerful musicians are able to negotiate substantial moral rights protections in their licensing and publishing agreements,[184] statutory limitations are necessary to constrain publishers and performance rights societies from extracting rights from artists.

E. *Standards of Review*

Taken as a whole, VARA is not suitable for extension to musical works, but it still holds tremendous value in for musical works in that it has given rise to a substantial body of case law on moral rights.[185] Having been in place for nearly thirty years, VARA has been discussed, at least in part, by most federal circuit courts.[186] Courts have had the opportunity to discuss the meaning of specific provisions of VARA.[187] But more importantly, courts have had a chance to grapple with the values and principles underlying moral rights doctrine.[188]

Thus, courts will not only have VARA precedents to draw on for certain factual situations but they will also generally be more comfortable interpreting

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[181] *See supra* notes 149–51 and accompanying text.

[182] Desai, *supra* note 17, at 18.

[183] *Id.*; Symposium, *supra* note 74, at 131–32.

[184] Symposium, *supra* note 74, at 136.

[185] *See, e.g.*, Kelley v. Chi. Park Dist., 635 F.3d 290, 303 (7th Cir. 2011) (explaining that a local garden did not have the type of authorship and stable fixation necessary to qualify for protection under VARA); Mass. Museum of Contemp. Art Found., Inc. v. Büchel, 593 F.3d 38, 41–42 (1st Cir. 2010) (discussing whether unfinished works qualify for protection under VARA); Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 129 (1st Cir. 2006) (explaining that VARA does not provide protection for site-specific works); Pollara v. Seymour, 344 F.3d 265, 265–66 (2d Cir. 2003) (discussing how a hand-painted banner that commissioned to draw attention to a lobbying effort falls outside the scope of VARA).

[186] *See* cases cited *supra* note 185.

[187] *See, e.g.*, Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995) ("The right of integrity allows the author to prevent any deforming or mutilating changes to his work . . . .").

[188] *See, e.g.*,

> The rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved. . . . Because they are personal to the artist, moral rights exist independently of an artist's copyright in his or her work.

Id.

the substantive provisions of this new legislation, given that the rights conferred under it are so similar to those created under VARA.[189]

F. *Remedies*

The inclusion of a particularized remedy section might seem somewhat unusual, given that violations of other rights associated with copyrightable works are consolidated in one chapter of Title 17.[190] However, given the unique nature of the works in question, and that the goal for this note is to propose the best possible solution for decontextualization of musical works, adjusting and adding to traditional copyright remedies is necessary. Injunctive relief is both a traditional and unobjectionable remedy, necessary to curtail any present or impending violations of an author's rights.[191] Compensatory damages are a common remedy for copyright violations, but they are typically meant to address economic losses.[192] The damages described in this proposal, though, are non-economic and intended to compensate the plaintiff for reputational harm in the same way plaintiffs in defamation suits are compensated for reputational harm.[193] Given that the rights in question here are non-economic, the inclusion of non-economic compensatory damages in place of economic compensatory damages is a reasonable approach and necessary to vindicate the rights of musicians.

The real potential sticking point with respect to remedies in this proposal, however, will be the inclusion of punitive damages. Punitive damages are inherently controversial topic, and many parties are naturally averse to them.[194] As such, their inclusion in a statutory proposal to vindicate a set of rights that are neither well-known nor well-settled is naturally controversial. Punitive

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[189] *See supra* notes 167–68 and accompanying text.

[190] 17 U.S.C. §§ 501–513 (2006).

[191] *See, e.g.*, 17 U.S.C. § 502 (2006). Under the Copyright Act, injunctions may be granted in order to "prevent or restrain" copyright infringement, indicating that they are used to address both presently occurring and future violations. *See id.*

[192] *See* 17 U.S.C. § 504 (2006) ("The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.").

[193] 50 AM. JUR. 2D, *Libel and Slander* § 353 (2017) (stating that defamation suit plaintiffs are often entitled to "general damages, or those which the law presumes to be the natural, proximate, and necessary result of the publication and which represent such effects of the defamation as loss of reputation, shame, mortification, and hurt feelings").

[194] *See generally* Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence Measured Remedies*, 40 ALA. L. REV. 831, 834 (1989) (arguing that punitive damages are not subject to measurement or effective limits); Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)* (Coase-Sandor Inst. for Law & Econ. Working Paper No. 50, 1997) (describing the award of punitive damages as arbitrary and unpredictable).

damages are often valued for their deterrent effect.[195] The harm that inspired this note, the decontextualization of music in political settings, is particularly difficult to control. Injunctive relief, while adequate to constrain the unauthorized uses of music, comes with inherent delays. Plaintiffs must not only jump through the procedural hurdles of filing a claim in court, which would require that they be notified of the unauthorized use, but also be able to demonstrate a "likelihood of success on the merits,"[196] which would be difficult in a relatively unsettled area of law. Furthermore, injunctive relief only constrains future harm, which in cases where there has already been an unauthorized use, may be wholly ineffective. Therefore, the best and perhaps only way to resolve the issue of unauthorized uses of music is to deter the practice altogether through the use of punitive damages.

G. *Reconciliation with Existing Moral Rights Doctrine*

Presently, the biggest concern with respect to reconciliation involves making sure that this new legislation would not disrupt the existing protections for visual works in VARA. The substantive rights created under this new act are easily recognizable as very similar to those in VARA,[197] which should mean that the judicial interpretations of those rights would be undisturbed. The most substantial differences between VARA and this new legislation relate to more ancillary issues, such as contractual waiver[198] and remedies.[199] While not insignificant, these differences should not interfere with or complicate the enforcement of rights created under VARA.

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[195] *See* Lisa M. Broman, Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 653 (1982) ("[D]eterrence and punishment are companion policies justifying punitive damages."); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much*, 40 ALA. L. REV. 1143, 1146 (1988) ("A consensus among legal scholars holds that deterrence, along with punishment, is the goal of punitive damages."). *But see* Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 70 (1985) ("It is not so clear, however, that the deterrence rationale supports the imposition of punitive damages on product manufacturers.").

[196] O'Toole v. O'Connor, 802 F.3d 783, 788 (6th Cir. 2015) (describing a four-part test for injunctive relief that requires the plaintiff to show (1) a likelihood of success on the merits, (2) that she will likely suffer irreparable harm without the injunction, (3) that the balance of equities favors her, and (4) that injunctive relief would serve the public interest).

[197] *See supra* notes 67–69 and accompanying text. It should be emphasized again, though, that the right of integrity created under this new legislation is somewhat broader than that created under VARA due to the inclusion of the "other derogatory action" language. *See supra* note 159 and accompanying text.

[198] *See supra* notes 180–84 and accompanying text.

[199] *See supra* notes 190–96 and accompanying text.

H. *Resolving Decontextualization of Music in Political Settings*

The foregoing proposal was created in response to and with the intention of resolving decontextualization of music in political settings. To that end, one of its most important characteristics remains the inclusion of the "other derogatory action" language from Article 6bis of the Berne Convention in its articulation of the right of integrity. Looking at the other terms that precede that catch-all phrase; distortion, mutilation, and modification; it could be argued that playing a particular musical work in a political context would not be covered by the Act. Even the broadest of the three, modification, would need to be stretched to its logical limits to cover this particular type of conduct.

After creating suitable substantive rights, the proposal's next most important quality has to be the statutory prohibition against waiver of those rights through written agreements. Contractual relationships, from record deals to licensing agreements, are utilized heavily in the music industry.[200] Given the serious disparities in bargaining power between most artists and the entities with which they negotiate these contracts, a statutory limit on the waiver of an artist's moral rights is indispensable.[201] Otherwise, the creation of those rights would be a pointless enterprise.

Finally, in order for any right to be valuable, it must carry a legitimate prospect of enforcement. To that end, the proposal utilizes a three-tiered remedy structure, which provides for injunctive relief, non-economic relief, and punitive damages, to curtail unauthorized uses and, to the extent possible, restore the artist to a point preceding the violation of their rights. Injunctive relief is necessary to stop both known and prospective violators, thus preventing or confining the damage done to the artist's work and reputation.[202] Non-economic compensatory damages, while not a perfect solution, provide a means of restoring the artists to a point prior to the violation.[203] And given the serious, persistent, and omnipresent threat of decontextualization, punitive damages will be an important part of enforcing any moral rights legislation by deterring potential bad actors.[204]

VII. CONCLUSION

Presently there is an absence of suitable doctrines to resolve the issue of unauthorized uses of music in political campaigns. Establishing a functional moral rights doctrine that applies to musical works should go a long way toward fixing this problem. Attempting to mold artists' complaints to fit within longstanding intellectual property doctrines simply is not a feasible approach

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200 *See* Desai, *supra* note 17, at 3–11.
201 *Id.* at 8, 11; Symposium, *supra* note 74, at 37.
202 *See supra* note 191 and accompanying text.
203 *See supra* notes 192–93 and accompanying text.
204 *See supra* notes 194–95 and accompanying text.

moving forward.[205] Furthermore, relying on the ability of authors to contract for their moral rights simply does not account for the interests of authors who lack significant bargaining power.[206] If the United States ever wants to live up to its obligations under the Berne Convention, it must commit to a shift in its paradigm regarding the rights of authors of copyrightable works.

The true value of this Note may come not from its proposed statutory reforms but rather from its contribution to that effort to raise awareness of moral rights. As was noted in the Copyright Office's Notice of Inquiry, there is a general lack of awareness on behalf of both artists and art consumers of the doctrine of moral rights.[207] A statutory remedy is helpful only if people are aware and understand what it is designed to accomplish. Such being the case, if this note can contribute to the public discourse on and help raise awareness of moral rights, it may have some value independent of its proposed legislative remedy.

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[205] *See supra* notes 124–27 and accompanying text.

[206] *See supra* notes 75–95 and accompanying text.

[207] Notice of Inquiry, *supra* note 62, at 7872 (indicating that the Copyright office was unable to assess some of VARA's provisions because artists and art consumers were generally unaware of moral rights).